No. 08-1076

FILED
MAR 2 4 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JILL CLARK, an individual and candidate for Minnesota Supreme Court Associate Justice, Seat #4, and HEATHER ROBINS, an individual and a registered voter,

Petitioners,

v.

TIM PAWLENTY, in his official capacity as Governor of the State of Minnesota, MARK RITCHIE, in his official capacity as Secretary of State of the State of Minnesota, and FRAN WINDSCHITL, Rice County Auditor,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION OF RESPONDENTS TIM PAWLENTY AND MARK RITCHIE

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QUESTION PRESENTED

Whether Petitioners have put forth compelling reasons for certiorari review of the Minnesota Supreme Court's decision in light of the limited nature of the proceeding below, the predominance of issues of state law, and Petitioners' failure to provide evidentiary support for the central premise of their First Amendment claims.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Minn. Const. art. VI, §§ 7 and 8 provide:

> Sec. 7. **Term of office; election.** The terms of office of all judges shall be six years and until their successors are qualified. They shall be elected by the voters from the area which they are to serve in the manner provided by law.
>
> Sec. 8. **Vacancy.** Whenever there is a vacancy in the office of judge the governor shall appoint in the manner provided by law a qualified person to fill the vacancy until a successor is elected and qualified. The successor shall be elected for a six year term at the next general election occurring more than one year after the appointment.

Minn. Stat. § 204B.36, subd. 5 (2008) provides:

> If a chief justice, associate justice, or judge is a candidate to succeed again, the word "incumbent" shall be printed after that judge's name as a candidate.

Minn. Stat. § 204B.44 (2008) provides:

> Any individual may file a petition in the manner provided in this section for the correction of any of the following errors, omissions, or wrongful acts which have occurred or are about to occur:
>
> (a) an error or omission in the placement of printing of the name or description of any candidate or any question on any official ballot;

(b) any other error in preparing or printing any official ballot;

(c) failure of the chair or secretary of the proper committee of a major political party to execute or file a certificate of nomination;

(d) any wrongful act, omission, or error of any election judge, municipal clerk, county auditor, canvassing board or any of its members, the secretary of state, or any other individual charged with any duty concerning an election.

The petition shall describe the error, omission, or wrongful act and the correction sought by the petitioner. The petition shall be filed with any judge of the Supreme Court in the case of an election for state or federal office or any judge of the district court in that county in the case of an election for county, municipal, or school district office. The petitioner shall serve a copy of the petition on the officer, board or individual charged with the error, omission, or wrongful act, and on any other party as required by the court. Upon receipt of the petition the court shall immediately set a time for a hearing on the matter and order the officer, board or individual charged with the error, omission or wrongful act to correct the error or wrongful act or perform the duty or show cause for not doing so. The court shall issue its findings and a final order for appropriate relief as soon as possible after the hearing. Failure to obey the order is contempt of court.

STATEMENT OF THE CASE

In this case, Petitioners sought unsuccessfully to invoke the original jurisdiction of the Minnesota Supreme Court under a specialized statutory procedure which provides for expedited correction of election ballot errors, for the purpose of presenting a broad-based challenge to the State of Minnesota's judicial selection process. The court found the action untimely, not conducive to consideration of all of the Petitioners' arguments, and deficient on the merits. The court's opinion is reported at 755 N.W.2d 293 (Minn. 2008) and printed in the Appendix (hereinafter "Pet. App.") to the instant Petition for Writ of Certiorari at pages 1a to 39a.

In January 2006, pursuant to Article VI, Section 8, of the Minnesota Constitution, Minnesota Governor Tim Pawlenty appointed Lorie Skjerven Gildea to the office of Associate Justice of the Minnesota Supreme Court. The appointment was necessary to fill a vacancy on the court pending election of a successor at the 2008 election. On July 1, 2008, Justice Gildea filed her Affidavit of Candidacy for election to the seat to which she had been appointed. On July 15, 2008, Petitioner Jill Clark filed for the same seat. Because four candidates, including Gildea and Clark, filed for the office, the contest was placed upon the ballot for the statewide primary election to be held on September 9, 2008. *See* Minn. Stat. § 204D.07 (2008).

On August 14, 2008, Clark and her co-Petitioner, voter Heather Robins, filed a petition in the Minnesota Supreme Court pursuant to Minn. Stat. § 204B.44, seeking an order (1) declaring Justice Gildea to be ineligible to run for the office she then occupied or, in the alternative, (2) declaring that she could not be designated as an "incumbent" on either the primary or general election ballot as provided by Minn. Stat. § 204B.36, subd. 5 (2008). Petitioners' claims were based primarily upon their own construction and application of the language of the Minnesota Constitution and statutes quoted above. Their petition also included assertions that the "incumbent" designation, either alone or in combination with gubernatorial appointments, frustrates the Minnesota constitutional directive that judges be elected, *see* Minn. Const. art. VI, § 7, and violates Petitioners' rights under the First Amendment of the U.S. Constitution. Following an accelerated briefing and argument schedule, the court, on August 26, 2008, denied the petition in all respects.[1] The court's opinion was filed on September 5, 2008.[2]

In light of the limitations upon the scope of relevant issues and relief available under the Minn. Stat. § 204B.44 procedure, the court declined to address claims related to the validity of gubernatorial appointments to fill judicial vacancies. The court also

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[1] *Clark v. Pawlenty*, Minn. S. Ct. No. A08-1385, Order dated August 26, 2008, Pet. App. 40a-41a.

[2] Pet. App. 1a-39a.

dismissed the petition as to Governor Pawlenty, whose sole involvement was the appointment of Justice Gildea in January of 2006.[3]

Citing Petitioners' unreasonable delay in filing their Petition and the prejudice to election officials and judicial candidates for reelection, the Minnesota Supreme Court denied the Petition as applied to the September 9, 2008 primary on the grounds of laches.[4]

The court next rejected Petitioners' claim that Justice Gildea was ineligible to run for election as a "successor" within the meaning of Minn. Const. art. VI, § 8.[5] The court also rejected Petitioners' interpretation of Minn. Stat. § 204B.36, subd. 5, pursuant to which Justice Gildea could not be identified as an incumbent because she was not a candidate to "succeed again" to the seat in question.[6]

The court rejected Petitioners' claim that incumbency designation for sitting judges contravenes Minnesota's constitutional judicial election requirements, finding that Petitioners had failed to establish as a factual matter that the designation in itself impermissibly confers a significant advantage.[7]

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[3] Pet. App. 5a.

[4] Pet. App. 14a.

[5] Pet. App. 23a.

[6] Pet. App. 25a.

[7] Pet. App. 27a-28a.

The court also noted that in two previous cases it had rejected constitutional challenges to the incumbent-designation statute on the ground that it served a legitimate public purpose of informing voters of the identity of the current officeholder. *See Peterson v. Stafford,* 490 N.W.2d 418, 424 (Minn. 1992), *cert. denied,* 507 U.S. 1033, 113 S. Ct. 1852 (1993); *Gustafson v. Holm,* 44 N.W.2d 443, 447 (Minn. 1950). The court noted that the *Peterson* case had expressly held that a "middle of the road" approach between ordinary elections and the so-called "Missouri Plan" was authorized by the Constitution.[8]

Finally, the court rejected Petitioners' First Amendment claims due to the lack of a factual foundation for their unfair-advantage argument. The court also noted that other authorities cited by Petitioners suggested that the incumbent designation might impose, at most, a *de minimis* burden on other judicial candidates, which is justified by the legitimate purpose of providing relevant information to the voters.[9]

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[8] Pet. App. 28a-31a.

[9] Pet. App. 31a-36a.

REASONS FOR DENYING THE PETITION

Sup. Ct. R. 10 states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . .
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This case falls far short of meeting these criteria.

ARGUMENT

I. The Procedural Posture of This Case Makes it Unsuitable for Review in This Court.

To be properly suited for certiorari review, a decision of a state high court should be squarely based upon a clear and fully litigated question of

federal law. *See generally* R. Stern, E. Gressman, S. Shapiro & K. Greller, *Supreme Court Practice* 195, 249, 429 (8th Ed. 2002). Notwithstanding the broader scope of Petitioners' statement of the "Question Presented," Petitioners' arguments in the Minnesota court and this Court are directed to the proposition that the frequency of vacancy-filling appointments by the Minnesota Governor, in conjunction with the statutory incumbency designation, operate to undercut the popular election of judges as envisioned by the Minnesota Constitution. *See Clark v. Pawlenty*, 755 N.W.2d 293, 298, 309 (Minn. 2008), Pet. App. 4a, 31a; Petition at 2, 3, 10, 15.

First, that issue is ultimately one of state rather than federal law. Petitioners cite no provision of the federal constitution or statutes that precludes an incumbent judge from being identified as an incumbent on the ballot, and Minnesota's Constitution, art. VI, § 7, states that election of judges shall be "in the manner provided by law."

Second, due to the limited scope of the statutory procedure Petitioners chose to pursue, all elements of their claims were not properly before the court for decision. As pointed out above, this case was commenced under Minn. Stat. § 204B.44, the narrow purpose of which is to provide an expedited mechanism for correcting "errors, omissions, or wrongful acts" pertaining to ballot preparation and related election procedures. Consequently, issues relating to gubernatorial appointments to fill judicial vacancies were not properly before the court, except insofar as

they related to the interpretation of the relevant ballot preparation statute, Minn. Stat. § 204B.36, subd. 5. As a result, the state supreme court properly dismissed Governor Pawlenty as a party.

In addition, the expedited procedure prescribed by section 204B.44, with venue in the state supreme court, for challenges related to state-officer elections, is not conducive to development of a complete factual record. *See, e.g., McDonough v. Hickey,* 180 N.W.2d 415 (Minn. 1970) (court declined to assume jurisdiction where time did not allow for adequate hearing and determination without disturbing orderly election process). Therefore, such cases are often decided upon stipulated or uncontested facts. *See, e.g., Breza v. Kiffmeyer,* 723 N.W.2d 633, 634 (Minn. 2006); *Smith v. Kiffmeyer,* 721 N.W.2d 912, 913 (Minn. 2006). In the instant case, however, the factual predicate for Petitioners' state and federal constitutional claim was neither stipulated nor established by credible evidence. *Clark*, 755 N.W.2d at 309, Pet. App. 27a. Consequently, due to (1) the constraints inherent in the judicial procedure chosen by Petitioners and (2) their failure to present evidence in support of their claims, no significant factual record exists upon which to conduct a meaningful certiorari review.

II. The Minnesota Supreme Court's Decision is not Inconsistent With any Decisions of This Court or of Other Federal Courts.

Petitioners' assertion that the Minnesota court's decision is contrary to this Court's decision in *Republican Party of Minnesota v. White,* 536 U.S. 765, 122 S. Ct. 2528 (2002), is without basis. In *White,* the Court dealt solely with the validity of the so-called "announce clause" in the Minnesota Code of Judicial Conduct, which prohibited candidates for judicial office from announcing their views on disputed legal or political issues. *Id.* at 768, 122 S. Ct. at 2531. A majority of the Court held that the "announce clause" impermissibly prohibited a category of political speech on the basis of its content, thus contravening candidates' First Amendment rights. *Id.* at 787-88, 122 S. Ct. at 2541-42. That decision, however, contains no suggestion whatever of any constitutional requirement that states select judges by popular elections – or that procedures for judicial elections, where they are held, must be the same as elections for other offices. To the contrary, all of the justices in *White* acknowledged the unique issues associated with judicial selection that distinguish that process from those related to choosing other public officials.

This Court's majority opinion in *White* specifically states: "We neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office." *Id.* at 783, 122 S. Ct. at 2539. Justice O'Connor's concurring opinion further highlights the

differing approaches of the federal and state governments to the selection of judges, including the "Missouri Plan," pursuant to which only incumbent judges appear on the ballot for retention or rejection. *Id.* at 790-91, 122 S. Ct. at 2543 (O'Connor, J., concurring). *See also id.* at 793-94, 122 S. Ct. at 2544-45 (Kennedy, J., concurring); *id.* at 798, 122 S. Ct. at 2547 (Stevens, J., dissenting); *id.* at 803-05, 122 S. Ct. at 2550 (Ginsburg, J., dissenting).

The Eighth Circuit decision on remand, which likewise dealt with express restrictions upon judicial candidates' political expressions and associations,[10] is also totally inapposite to the instant case, because no restriction on Petitioners' freedom of expression is at issue here.

In addition, contrary to Petitioners' representations, none of the other federal cases cited in the Petition holds that an incumbency designation on election ballots generally, let alone in judicial contests, violates the guarantees of the First Amendment or any other provisions of the Constitution. Specifically:

1. *Morse v. Republican Party of Virginia,* 517 U.S. 186, 116 S. Ct. 1186 (1996), contains no determination of "unconstitutional advantage" to incumbents due to ballot placement. It appears that the parenthetical

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[10] *Republican Party of Minnesota v. White,* 416 F.3d 738 (8th Cir. 2005).

characterization of the case on page 11 of the Petition is drawn not from the Court's language but from the title of a law review article mentioned in passing in a footnote. *Id.* at 197 n.13, 116 S. Ct. at 1195 n.13.

2. In *McLain v. Meier,* 637 F.2d 1159 (8th Cir. 1980), *rehrg. denied*, October 28, 1980, the circuit court determined only that the district court's "inference that some advantage may occur to a candidate whose name appears first" on the ballot was not clearly erroneous based upon evidence produced at trial. *Id.* at 1166. Contrary to Petitioners' claim, there was no "conclusive finding" on that point.

3. *Mann v. Powell,* 333 F. Supp. 1261 (N.D. Ill. 1969) had nothing to do with "incumbent labeling on the ballot." Rather, it upheld the Illinois statute controlling ballot placement but enjoined the Secretary of State from arbitrarily breaking "ties" in qualification for ballot position in favor of "personal acquaintances and party regulars." *Id.* at 1267.

4. Finally, contrary to Petitioners' characterizations, California statutes were stricken in the case of *San Francisco County Democratic Central Committee v. Eu,* 826 F.2d 814 (9th Cir. 1987), not because they favored incumbents but due to their extensive interference with the internal governance of political parties.

Even assuming, however, that one or more of the cases cited by Petitioners did support the proposition that granting top ballot position to incumbents would give them an impermissible advantage, Petitioners

cite no support for their *a priori* assertion that identification of the incumbent in the absence of favored ballot positions leads to a similar result. As the Minnesota court noted in this and previous Minnesota cases, the fact that a candidate is the incumbent is information that is potentially relevant to a voter's decision at the polls – either in the candidate's favor *or* to her detriment. *See Peterson,* 490 N.W.2d at 424. Being first on the ballot, however, conveys no relevant information whatsoever. Thus, Petitioners have not demonstrated that the Minnesota court's decision is inconsistent with any decisions of this Court or any federal circuit courts.

III. The Minnesota Court's Decision Does not Conflict with Those of Other States' High Courts.

The only case cited by Petitioners that struck down a statute providing for an "incumbent" designation in a judicial election is the Michigan case of *Wells v. Kent Co. Bd. of Elec. Comm'rs,* 168 N.W.2d 222 (Mich. 1969). That case, however, did not question the constitutionality of incumbency designations in judicial elections generally. Such designation was in fact provided for in the Michigan Constitution. It dealt solely with the validity, under the Michigan Constitution, of a statute permitting judges of phased-out municipal courts to be so identified on the ballot when running for the office of district judge. *Id.* at 229.

IV. This Case Does not Present a Question of Federal Law That Should be Settled by This Court.

As Justice O'Connor highlighted in her concurring opinion in *White,* the several states approach the process of judicial selection in widely divergent ways. Many states do not hold elections at all, and many of those that do place only the incumbent on the ballot. Plainly this is a subject that does not lend itself to a one-size-fits-all federal mandate. The Minnesota court's decision was based specifically on the Minnesota Constitution and statutes. There is no reason for this Court to disturb those state law determinations or to believe that any decision by this Court on the merits would settle any matter outside the State of Minnesota.

CONCLUSION

For the foregoing reasons, this case does not satisfy the criteria adopted by this Court for the granting of certiorari review. Consequently, Respondents Pawlenty and Ritchie respectfully request that the petition be denied.

Dated: March 24, 2009

Respectfully submitted,

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